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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 710

GILBERT GREEN,

Petitioner,

against

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT LOUIS J. LEFKOWITZ IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 380 F. 2d 445 and appears as Appendix B to the petition for certiorari, pp. 5a-16a. The opinion of the District Court (R. 21a-28a) is reported at 259 F. Supp. 290.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

Questions Presented

1. Did the Court of Appeals apply the correct standard in determining whether or not a question warranting the convening of a three-judge Court was presented?

2. Did the complaint raise a substantial federal question requiring the convening of a three-judge statutory court.

Statutes Involved

New York Constitution Article 2, Section 3, New York Election Law, Section 152, New York Penal Law Sections 510(a) and 752 (Petition, Appendix A, pp. 1a to 4a).

Statement

Petitioner commenced an action in the United States District Court for the Southern District of New York seeking *inter alia*, an order pursuant to 28 U.S.C. §§ 2281 and 2284, convening a three-judge court to pass on the constitutionality of the New York laws which prohibit from voting any person who has been convicted of a felony (R. 3a-9a). Specifically, he attacked Article 2, § 3 of the New York State Constitution, § 152 of the New York State Election Law and § 510-a of the New York State Penal Law (R. 5a-7a).

The complaint alleged that petitioner, but for his felony convictions, would be eligible to vote in the State (R. 3a-4a). Petitioner was convicted in the United States Dis-

trict Court for the Southern District of New York of conspiracy to violate 18 U.S.C. § 2385. On October 21, 1949, he was sentenced to serve a term of five years in prison and to pay a fine of $10,000. He thereafter was convicted in the same Court of contempt of court for failing to surrender after conviction. He was sentenced on March 26, 1956, to a term of three years in prison, the term to run consecutively to his conspiracy conviction (R. 5a). Petitioner has served his sentence but has neither applied for nor received a presidential pardon (R. 5a).

The complaint alleged that the challenged statutes deprived petitioner of freedom of speech, opinion and association, due process of law, equal protection of the laws and constitutionally guaranteed privileges and immunities, subjected him to cruel and unusual punishment and constituted a bill of attainder. It also alleged that the state could not require petitioner to comply with the federal pardon requirements since they are unconstitutional and further that he was entitled to be treated as an exception to the New York law by virtue of the "political" nature of his crimes.

The District Court, following the standards enunciated in *inter alia, Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, 718; *California Water Service* v. *Redding,* 304 U. S. 252; and *Ex Parte Poresky,* 290 U. S. 30, addressed itself first to whether the substantiality of the issue raised in the complaint warranted the calling of a three-judge court. Specifically, the Court inquired into whether the question raised was insubstantial "'either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject' *California Water Service* v. *Redding, supra,* at 255" (R. 24a).

The Court concluded that "the Supreme Court has upheld the right of a State to bar felons from the voting rolls" (R. 24a) relying on *Davis* v. *Beason,* 133 U. S. 333;

Lassiter v. *Northampton County Board of Elections*, 360 U. S. 45 and *Trop* v. *Dulles*, 356 U. S. 86.

The Court held further that the complaint was "obviously without merit" (R. 27a) since, in seeking to rely on section 1 of the Fourteenth Amendment, it ignored section 2 of that Amendment which provides, *inter alia*, that a State's representation in Congress may be reduced if male citizens, 21 years of age and over are denied the right to vote:

> "except for participation in rebellion or other crime." (U. S. Const. amend. XIV, § 2.)

The Court of Appeals affirmed the decision of the District Court finding the claim to be without substance. The Court enunciated the standards for determining whether or not a three-judge Court was required relying, as had the District Court, on *California Water Service Co.* v. *City of Redding*, 304 U. S. 252. The Court then went on to hold that the New York provisions were not cruel and unusual punishment nor a bill of attainder. The Court determined that petitioner's claim that the equal protection clause of the fourteenth amendment created a question with respect to the disfranchisement of convicted felons was foreclosed both by decisions of this Court, by the fact that there was a reasonable basis for the classification and by the fact that the classification is expressly permitted by Section 2 of the fourteenth amendment. The Court found that even if it might be said that, but for section 2, certain crimes might raise a substantial federal question, the crimes of which petitioner was convicted did not. In any event section 2 additionally was held to preclude the challenge by petitioner.

ARGUMENT

The instant case did not present a substantial Federal question. The disposition, therefore, by the single District Judge declining to convene a three-judge Court and dismissing the complaint was proper.

I.

The District Court and the Court of Appeals applied the correct standard in determining whether or not a question warranting the convening of a three-judge Court was presented.

Both the District Court and the Court of Appeals determined that no substantial question was presented by the complaint requiring the convening of a three-judge Court. The law has been firmly enunciated that a three-judge court should not be convened where the alleged constitutional attack on the law sought to be enjoined is insubstantial. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 115; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715; *California Water Service Co.* v. *City of Redding*, 305 U. S. 252, 255; *Ex Parte Poresky*, 290 U. S. 30; *Morrison* v. *State of California*, 238 F. Supp. 22, 23 (S. D. Cal.), app. dism. 9th Circuit, No. 19, 982 (October 25, 1965); *Bradley* v. *Waterfront Commission*, 130 F. Supp. 303, 305 (S.D.N.Y., 1955).

The lack of substantiality in a constitutional question may appear either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of the Supreme Court as to foreclose the subject". *California Water Service Co.* v. *City of Redding, supra,* at 255; *Ex Parte Poresky, supra,* at 32.

The three-judge Court requirement is a highly technical one enacted as a protective device for the states and is to be strictly construed. Both Courts below found that Section 2 of the Fourteenth Amendment rendered the

complaint "obviously without merit". Although petitioner insists that the meaning of Section 2 is in dispute he fails here, as he failed in the two lower courts, to demonstrate that there is any plausible dispute at all with respect to the fact that Section 2 specifically permits the disfranchisement for participation in crime. The Court of Appeals did not determine the merits of the complaint except by the standard of whether or not a substantial federal question was raised requiring further consideration.

II.

The determination of the Court of Appeals affirming the holding of the District Court that no substantial Federal question was raised by the complaint and, therefore, that a three-judge Court was not required is correct.

Petitioner's argument that the Constitution forbids the States to refuse to permit convicted felons to vote contradicts the unequivocal language of Section 2 of the Fourteenth Amendment. That section provides, in pertinent part:

> ". . . But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced . . .". (Emphasis supplied)

The staggering simplicity of this answer to petitioner's claim does not detract from its accuracy. Petitioner attempts to cast doubt on the meaning of Section 2 of the Fourteenth Amendment. However, the only legislative history he has adduced simply serves to strengthen the fact that, where original suggestions with respect to the Fourteenth Amendment merely permitted the States to withhold the franchise from persons who had participated in

the Civil War, the provision was specifically amended to provide that the States could withhold the franchise from persons who had also participated in "other crime".

Indeed, while the phrase "participation in rebellion" has a specific Civil War context (Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Ford. L. Rev. 93, 101 [1961]), the phrase "or other crime" clearly relates to a more general concern. By 1865 some eighteen states and territories had constitutional provisions providing or authorizing the legislature to preclude convicted felons from the franchise.* Indeed, many members of the thirty-ninth Congress considered that previous crime was a reasonable consideration in establishing voter qualifications. (See eg. 39[1] Cong. Globe App. 121, Senator Sumner.)

Nor is it important that section 2 provides only for reduction in apportionment for violation of its strictures. Clearly it describes those voting qualifications considered basic by the fathers of the Fourteenth Amendment, i.e., male citizens, twenty-one years of age and not guilty of participation in rebellion or other crime. Whatever the original intention of the Fourteenth Amendment with respect to the applicability of section 1 to voter qualifica-

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* Cal. Const. art. II, § 1 (Const. of 1879 derived from 1849); Conn. Const. art. 6, § 3 (Const. of 1965 derived from 1818); Del. Const. art. V, § 2 (Const. of 1897 derived from 1831) (election offenses); Fla. Const. art. VI, §§ 4, 5 (Const. of 1885 derived from 1938); Ind. Const. art. 2, § 8 (1851); Ill. Const. art. VII, § 7 (Const. of 1870 derived from 1818); Iowa Const. art. II, § 5 (Const. of 1857 derived from 1846); La. Const. art. VIII, § 1(c) (Const. of 1921 derived from 1812); Minn. Const. art. VII, § 2 (1857); Nev. Const. art. II, § 1 (1864); N Y. Const. art. II, § 3 (Const. of 1938 derived from 1821); Ohio Const. art. V, § 4 (1851); Ore. Const. art. II, § 3 (1857); Pa. Const. art. VIII, § 9 (1844) (election offenses); R. I. Const. art. II, § 4 (1843); S. D. Const. art. VII, § 8 (1861); Tenn. Code Ann. § 2-205 (1955 from Code of 1858); Tex. Const. art. 6, § 1 (1845); Wisc. Const. art. 3, §§ 2, 6 (1848).

tions (See Van Alstyne, The Fourteenth Amendment, the "Right" to Vote and the Understanding of the Thirty-ninth Congress, 1965 Sup. Ct. Rev. 33), clearly the framers did not mean that any of the qualifications in section 2 could constitute a denial of due process or equal protection or they would not have inserted them. The recent examination of voting qualifications in light of section 1 (*e.g. Harper* v. *Virginia State Board of Elections,* 383 U. S. 663; *Carrington* v. *Rash,* 380 U. S. 89), thus, is limited by the qualifications permitted *in haec verba* in section 2. It required a constitutional amendment to secure the vote for women (U. S. Const. amend. XIX) and it would require such an amendment to guarantee the vote for aliens, for persons under twenty-one and for felons.

Even apart from Section 2 of the Fourteenth Amendment, this Court has decided that States may preclude persons who have been convicted of crimes from the franchise. *Davis* v. *Beason,* 133 U. S. 333. In sustaining a territorial statute with such a provision the Court, per Mr. Justice FIELD, stated that the law:

> "is not open to *any* constitutional or legal objection . . . it simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." *id.* at 347 (Emphasis added).

The viability of the *Davis* v. *Beason* rule has suffered no attrition by time and the exclusion of convicted felons from voting has consistently been cited as a reasonable classification within the meaning of Section 1 of the Fourteenth Amendment. In *Gray* v. *Sanders,* 372 U. S. 368, this Court, per Justice DOUGLAS said, in speaking of an election "by the people", that "[m]inors, felons and other classes may be excluded" (*Id.* at 380).

In *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, the Court said:

> "Residence requirements, age, previous criminal record (Davis v. Beason, 133 U. S. 333, 345-47, 33 L. ed. 637, 641, 642, 10 S. Ct. 299) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." (*Id.* at 51)

The principle that persons convicted of felonies might be excluded from the franchise was clearly recognized in *Trop* v. *Dulles*, 356 U. S. 86, 96-97. The classification of convicted felons for voting purposes is as reasonable as it is for many other purposes. As this Court said in *Estep* v. *United States*, 327 U. S. 114, 122:

> "A felon customarily suffers the loss of substantial rights."

Thus for example, even under federal law, a convicted felon may not hold office (18 U.S.C. § 201) and may not serve on federal grand or petit juries unless he has received amnesty or a pardon (28 U.S.C. § 1861). The states, too, may, where a legimate state interest is involved, restrict the activities of a convicted felon. See *DeVeau* v. *Braisted*, 363 U. S. 144, 158-59.

Congress itself, in the recently enacted voting law for the District of Columbia, provided that:

> "The term 'qualified elector' means a citizen of the United States . . . (c) who has never been convicted of a felony in the United States, or if he has been so convicted, has been pardoned." D. C. Code, 1961 Edition, 1966 Supplement Title 1, § 1-1102(2) (c).*

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* In addition to the States listed, *supra*, p. 5 and the District of Columbia, the following States have provisions respecting the

(Footnote continued on following page)

See also, *Morrison* v. *State of California*, 238 F. Supp. 22 (S. D. Cal.), *app. dism.* 9th Cir. File No. 19,982 (October 25, 1965); note, 66 Col. L. Rev. 1357 (1966).

This Court also has disposed of petitioner's contentions that the New York laws in question constitute a bill of attainder and cruel and unusual punishment. In fact, those laws are not penal at all. In *Trop* v. *Dulles*, 356 U. S. 86, the Court held (*Id.* at 95-97):

> "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. . . . The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punshing bank robbers, the statutes authorizing both disabilities

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(Footnote continued from preceding page)

disfranchisement of felons: Ala. Const. art. VIII, § 182 (1901); Alaska Stat. § 15.05.030 (1962); Ariz. Const. art. VII, § 2 (1912); Ark. Const. art. III, § 1 (1874); Ga. Const. art. II, § 2 (1945); Hawaii, Organ. Act. [48 U.S.C. 590] § 18 (1898); Idaho, Const. art. VI, § 3 (1890); Kan. Const. art. V, § 2 (1867); Md. Const. art. I, § 2 (1867); Mich. Const. art. II, § 2 (1963); Miss. Const. art. XII, § 240 (1890); Mo. Const. art. VII, § 2 (1945 derived from 1865); Mont. Const. art. IX, § 2 (1889); Neb. Const. art. VI, § 2 (1875); N. J. Const. art. II ¶7 (1947 derived from 1875); N. M. Const. art. VII § 1 (1911; N. C. Const. art. VI, § 2 (1875); N. D. Const. § 127 (1889); S. C. Const. art. 2 § 6 (1895); Utah Const. art. IV, § 6 (1895) (treason or crime against the elective franchise); Va. Const. § 23 (1902); Wash. Const. art. 6, § 3 (1889); Wyo. Const. art. 6, § 6 (1890).

would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a non-penal exercise of the power to regulate the franchise."

United States v. *Brown*, 381 U. S. 437, relied on by appellant in support of his claim that the statutes in question constitute a bill of attainder, lends no support to his position. The fact that disfranchisement may be used in a bill of attainder does not make every withholding of the franchise such a bill. The purpose of the act is the controlling feature. The bill of attainder was and is legislative punishment of designated persons or groups (*Id.* at 442, 447). It does not apply to a general class (*Id.* at 454, 461) and nothing in *Brown* undercuts the validity of the decision in *Trop*. See *De Veau* v. *Braisted, supra*, at 160.

See also Opinion below (Petition, p. 11a).

Petitioner insists that the state law (Election Law, § 152), which permits felons convicted of federal crimes who have received federal pardons, to vote is unconstitutional, thus making a collateral attack on the undisputed absolute discretion of the President to grant such pardons and on the regulations of the Department of Justice with respect to applications for such pardons (28 C.F.R. §§ 1.1-1.9).

But any quarrel which petitioner has with respect to the federal regulations surrounding pardons must be presented to the appropriate federal authorities. Petitioner has made no attempt to secure a pardon or to attack the federal regulations in an appropriate federal administrative or judicial proceeding with appropriate notice to the U. S. Attorney General. See 28 U.S.C. §§ 2282, 2284. The state has no power over federal pardon procedures and any remedy petitioner may have is not against the State of New York.

Indeed, the nature of the federal regulations for securing a pardon is wholly irrelevant to the instant proceeding, for, even, if this Court were to hold that such regulations

were unconstitutional, petitioner would not be able to vote in New York. He simply would be able to apply for a federal pardon without regard to the regulations which he alleges are offensive. He would not have succeeded in abrogating the New York State statute making pardon a prerequisite for voting.

It should be noted that the pardon power with respect to federal crimes is expressly vested solely in the President by the United States Constitution itself.

> "The President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." (U. S. Const. art. II, § 2, cl. 1).

Pardon is a matter of grace (*Knote* v. *United States*, 95 U. S. 149) subject only to executive (*United States* v. *Rosenberg*, 109 F. Supp. 108 [S.D.N.Y. 1952], *aff'd* 204 F. 2d 688 [2d Cir.]), and not to legislative authority. *Ex Parte Garland*, 71 U. S. 356 (4 Wall. 277).

Petitioner insists that he is in a special position with regard to the vote by virtue of the fact that his crimes were "political" in nature. The question is inappropriate for consideration in this litigation. Any quarrel which petitioner had with the power of the federal courts to convict him of the crime of conspiracy to violate the Smith Act was properly to be raised during the criminal proceedings against him. New York does not attempt for purposes of the statute in question to assess the nature of the underlying felony. Moreover, in view of the Fourteenth Amendment and the Supreme Court cases, it need not.

It is ironic that were petitioner's conspiracy conviction the only crime for which he was convicted, he might well be able to vote in New York. New York has been progressive in this area. By recent amendment to Article 23 of the Correction Law (L. 1966, Ch. 654) per-

sons who have been convicted of only one felony may apply to vote. This state legislation also provides for relief from any disabilities imposed by reason of the conviction for the crime. However, this relief is available only to first offenders and petitioner was also convicted of the additional felony crime of contempt of court for failure to surrender after his conviction. This crime is not "political" in nature to use appellant's terminology and, indeed, shows a serious contempt and disregard for the processes of law and order. Under such circumstances, petitioner's attempt to carve out an exception for himself is entirely inappropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N. Y., November 9, 1967.

Respectfully submitted,

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